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No. 79-1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE MINNICK, HENRY J. DARDEN,
CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, *et al.*,
Respondents.

On a Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council, with the consent of all parties,[1] respectfully submits this brief as Amicus Curiae, in support of petitioners, Wayne Minnick, *et al.*

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council ("EEAC") is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique competence and understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and the various other Federal orders and regulations pertaining to nondiscriminatory employment practices.

Most of EEAC's members, moreover, have undertaken various types of affirmative action efforts either voluntarily or pursuant to the requirements of Executive Order No. 11246, 3 C.F.R. 169 (1965), *as amended and reprinted in* 42 U.S.C. § 2000e (1976). While they strongly agree that individual employers should have a wide latitude to undertake such efforts voluntarily (*cf. United Steelworkers of America* v. *Weber*, 443 U.S. 192 (1979)), they also are concerned that any governmentally adopted or compelled

affirmative action requirements should meet proper constitutional requirements which, of course, are stricter than those statutory standards governing purely private action. *Cf. Washington* v. *Davis*, 426 U.S. 229 (1976).[2]

Similarly, EEAC's members, as major employers of the nation's work force, have a vital interest in the promotion of sound statistical methodology used to ascertain work force availability and, where it exists, to identify and remedy employment discrimination. The equal employment obligations of a particular employer typically depend upon the qualifications required for particular jobs, the number of job openings, and the availability of qualified personnel in the relevant labor market. Because of these and other complex variables, a particular employer's work force often may legitimately fail to mirror theoretical minority and female availability statistics. Because of the increasing reliance upon statistical proof

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[2] Because of the difference in standards, it seems clear that employers may engage in voluntary affirmative action efforts beyond that which they may be *compelled* to undertake by government regulations. *Cf. United Steelworkers of America* v. *Weber*, 443 U.S. at 200 (approval of private race-conscious affirmative action plan did not involve state action, and thus did not implicate the Equal Protection Clause of the fourteenth amendment to the Constitution); *H. Earl Fullilove, et al.* v. *Klutznick, et al.*, 100 S. Ct. 2758, 2780 (Burger, C.J.) ("where private parties, as opposed to governmental entities, transgress the limitations inherent in the MBE program, the possibility of constitutional violation is more removed.") This case thus involves directly the permissible constitutional limits of government action rather than the statutory authority to undertake private voluntary efforts of this type.

by litigants and by the courts, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977), it is imperative that statistical analyses be sound in their development and reliable in their application.

In sum, EEAC members have a direct interest in ascertaining the proper constitutional scope of government authority to fashion and to enforce preferential employment goals, and in establishing appropriate methodologies for determining the relevant market for minority and female availability when such examination is necessary.

As a significant part of its activities, EEAC has participated as amicus curiae in a number of cases before this Court. Among such cases have been those involving the review of administrative, legislative and private voluntary preferential treatment schemes, *see, e.g., Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); *H. Earl Fullilove, et al.* v. *Klutznick, et al.*, 100 S. Ct. 2758 (1980); *United Steelworkers of America* v. *Weber*, 443 U.S. 192 (1979); as well as cases which addressed the use of statistics and evaluation of relevant labor markets in remedying discrimination, *cf. International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *Furnco Construction Co.* v. *Waters*, 438 U.S. 567 (1978).

STATEMENT OF THE CASE

In 1974, the California Department of Corrections (the "Correctional Department") adopted an Affirmative Action Plan (AAP) which, as revised in 1975, had as its principal objectives: (1) increasing the number of female employees in the Department to a percentage level equivalent with that in the total "California labor force" in April 1970; and (2) increasing the number of "minority" employees to a level equalling at least 70% of any given "minority" in the inmate population of the Department (*i.e.*, State prisoners). Although these percentage goals were directed only to the level of employment of new female and minority employees, the AAP, in fact, was to be applied to other employment-related decisions as well, including transfer and promotion. (Cert. Pet. App. A-5).

The AAP was challenged in California Superior Court by the California Correctional Officers Association representing male Caucasians who were employed by the Correctional Department, and who alleged that under the Plan they were denied promotions because of their race in favor of persons who were given preferential treatment. Although the California Court of Appeal found a conflict in the evidence as to how widely the preferential policies expressed in the Plan were pursued, it determined that where they had been applied, preferences were given to female sex or minority status to the extent that such status was considered a "plus" factor in the assessment of an employee for promotion or transfer. The Court also noted that some vacancies were left open and transfers and promotions delayed

until qualified female or minority employees could be found to fill them. (Cert. Pet. App. A-6). Although the trial court found there was discrimination in hiring, the court of appeal determined that the exercise of the preference was limited to the promotion, transfer or work assignment of *employees* only. *Id.*

In answers to interrogatories, the Department *denied* that it had engaged in intentional or willful discrimination against minorities or women. It also stated, however, that its past hiring practices and procedures had an adverse discriminatory impact on certain minorities and the female sex. "This statement," according to the California Court of Appeal, "was the only substantial reference in the evidence to the effect that the Department's personnel practices had discriminated against females and minorities in the 'past'." (Cert. Pet. App. A-7).[3]

The California Superior Court granted relief and entered a preliminary injunction prohibiting the Correctional Department from continuing to carry out its AAP. The order was subsequently reversed by the California Court of Appeal, which found, *inter alia*, that the AAP did not violate the Equal Protection Clause of the fourteenth amendment to the Constitution. Without elaboration, the court found that there was a compelling state interest in the "safe and efficient operation" and "proper management" of the correctional system. (Cert. Pet. A-15 through A-17). No record evidence, in the

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[3] The trial court's order denying the Department's motion to supplement the record with evidence of past discriminatory hiring practices was affirmed by the California Court of Appeal. (Cert. Pet. App. A-23).

AAP or elsewhere, was cited to support these conclusions. Moreover, the appellate court did *not* state that eliminating the effects of past discrimination was part of its rationale for approving the AAP. The California Court of Appeal reversed the permanent injunction, and the Supreme Court of California denied a hearing.

SUMMARY OF ARGUMENT

In concluding that the AAP was constitutionally permissible, the California Court of Appeal erred, not only in its failure to ascertain the sufficient government interest that would permit such a preference, but, assuming the interest existed, in its approval of forms of hiring ratios rationally unrelated to the AAP's implementation.

Whatever the probative significance of statistical evidence indicating adverse impact, this Court has declared that the state may establish otherwise impermissible racial classifications only where it seeks to remedy prior discrimination, and then only where appropriate findings of such discrimination have been made. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). Accordingly, unless the Correctional Department had adopted the racially preferential formula in its AAP with the expressed intention of remedying discrimination and made appropriate findings directly related to that purpose, its actions cannot withstand a constitutionally-based challenge by identifiable, incumbent employees whose expectations of transfer and promotion rights are adversely affected directly. This is certainly the case here, for not only was there no showing that past discrimination had triggered the

preference, but the record indicates that the state administrative body made no finding *at all* with respect to preference justification. Indeed, only after the initiation of litigation did the Department tender any justification, and then only on the basis of a conclusory statement that its policies had had an adverse impact on certain groups. Moreover, the California Court of Appeal ignored even this justification, and made a determination, *sua sponte*, and with no record support, that the "safe and efficient operation of correctional facilities" constituted a sufficient compelling state interest to justify the use of preferential instruments. As there is no constitutional motivation on the record for the racial and sex-based classifications, they must inevitably fall.

Equally significant in the constitutional evaluation of this case is that even if the state agency had demonstrated a constitutionally sufficient purpose, the AAP it sought to enforce was not at all suited to the accomplishment of that purpose. At least two distinct and necessary elements constitute the relevant market: *qualifications* and *geographic location*. When special qualifications are required to fill particular jobs, inferences of discrimination are unjustified if comparisons are made of an employer's work force to the general population, rather than to the smaller group of individuals who possess the necessary qualifications. In all events, the qualified labor market by definition never encompasses the non-labor population. *Hazelwood School District* v. *United States*, 433 U.S. 321 (1977). The geographic scope of statistics also must be carefully circum-

scribed to compare an employer's work force only with the population of the community from which the employer can be expected to hire. *Id.*

In this case, the Correctional Department's AAP sought to increase the number of "minority" employees to a level equalling at least 70% of any given "minority" in the inmate population of the Department (that is, the percentage of minorities among State prisoners). From the standpoint of qualifications, this is an appallingly inappropriate comparison, as the level of minority representation in the prison inmate force bears no relationship to the available, qualified applicant pool in the labor force. With respect to the female preference, it is primarily the geographic aspect of availability that has been distorted. The Department's AAP mandates increasing the number of female employees to a percentage level equivalent with that in the total "California labor force" in April 1970. It is the geographic area from which applicants would ordinarily come, however, that constitutes appropriately the geographic element in relevant labor market determination. Thus, the geographic area should have been limited to the appropriate area surrounding particular employment facilities rather than based on statewide figures.

As litigants and public policy makers rely ever increasingly on statistical evidence in employment discrimination cases, the need for sound statistical methodology grows proportionately. Yet, if a state government can adopt for itself, or mandate for private parties, availability standards that are wholly at odds with sound and accepted principles of labor

market determination, as it has sought to do here, a critical means for evaluating job bias claims and for formulating job bias remedies will have been rendered meaningless.

ARGUMENT

I. The Correctional Department's Preferential Employment Practices, Promulgated Without Appropriate Findings of Discrimination, Violated the Fourteenth Amendment Rights of Nonminority Employees

A. *Controlling Principles*

This case presents a purely constitutional issue, requiring the application of constitutional standards to state action that is inherently suspect. The constitutional standards are those emanating from the fourteenth amendment's Equal Protection Clause, and they are to be applied here to a state administrative agency's promulgation of what patently constitutes a race and sex-based preferential scheme.

This Court has recently reviewed in another context the legality of a state administrative agency's promulgation of a racial preference scheme. In the *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), the Court held unconstitutional a rigidly applied admissions policy that reserved a set number of medical school slots exclusively for minority applicants. The case elicited six separate opinions by this Court, and although a majority of the Court also ruled that race may be taken into account as one of the many factors determining the validity of preferential treatment to minorities, a majority of the Court agreed that the ruling at least meant that *preferential treatment by government authorities may be given only pursuant to an ad-*

ministrative, judicial or legislative finding of discrimination by the employer or industry. As Justice Powell observed, "we [the Court] have never approved preferential classifications in the absence of proven constitutional or statutory violations (footnotes omitted)." 438 U.S. at 302. Moreover, he underscored that "[w]e [the Court] have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations." *Id.* at 307, *citing Teamsters* v. *United States*, 431 U.S. 324, 367-76 (1977); *United Jewish Organizations* v. *Carey*, 430 U.S. at 155-56; *South Carolina* v. *Katzenbach*, 383 U.S. 308 (1966). On this point Justice Brennan, in an opinion joined by Justices White, Marshall and Blackmun, agreed that:

> Government may take race into account if it acts not to demean or insult any racial group, but to remedy disadvantage cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

438 U.S. at 325.[4] The four remaining Justices sub-

[4] That a preferential scheme can be justified under the fourteenth amendment only by a showing of past discrimination enjoys sound logical justification: only because race previously was taken into account in decision-making to the detriment of certain races could there be any justification for taking it into account again to rectify any initial injustice. See Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1289-91 (1970). Without the corrective element, any racially preferential scheme becomes

scribing to the opinion of Justice Stevens would have found the *Bakke* plan unlawful even on statutory grounds.

So crucial is this requirement of findings of past discrimination in the judicial review of government-sanctioned racial preference that it has been applied even to the enactment of racial preference programs by the Congress, which, unlike a state administrative agency, enjoys broad and unique remedial powers to cure the effects of prior discrimination. See *H. Earl Fullilove, et al.* v. *Klutznick, et al.*, 100 S. Ct. 2758 (Burger, C.J.).

Accordingly, in order to withstand constitutional scrutiny, the Correctional Department's AAP must have based its preferential scheme on *appropriate findings* of *past discrimination.* As we explain below, on both these counts the AAP is lacking and thus violates the fourteenth amendment rights of the individual petitioners.

B. *The Correctional Department's AAP Lacked Appropriate Findings of Past Discrimination*

As the record makes clear, the AAP contains no findings of discrimination, its purpose being simply "to insure [sic] compliance with equal employment opportunity laws and departmental policy." (Cert. Pet. App. A-5).[5] Without such findings, however, the

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merely the personal policy preferences of administrators, unrestricted by meaningful judicial review.

[5] Typically, however, equal employment statutes do not require, *ab initio,* preferential treatment absent a finding of discrimination. *See, e.g., International Brotherhood of Teamsters* v. *United States,* 431 U.S. at 340, n.20 ("Title VII imposes no requirement that a workforce mirror the general population").

AAP's preferences serve merely as arbitrary and capricious mechanisms for awarding employment and promoting employees.

The California Court of Appeal nevertheless determined that the AAP's preferences served "compelling state interests" and thus were constitutional. The court divined the existence of a compelling interest for the preference on the grounds of "safety," "efficiency," and "proper management" of the state's correctional system. (Cert. Pet. A-14 through A-17). Yet, no record evidence was cited to support these conclusions, and it does not appear that these factors were included in the Department's initial reasons for adopting the Plan. Equally important, the court did *not* state that eliminating the effects of past discrimination was part of its rationale for approving the Plan.

The fourteenth amendment, of course, requires a careful inquiry into motivation, in part to ensure that public officials have indulged in racial classification only to fit *best* the goal invoked in its defense. By limiting racial and sex preferences to carefully delineated circumstances, the actions of administrative officials are channeled in ways that can be evaluated with comparative ease by courts and which then, in turn, can more readily be examined on appeal. The California court's reliance on its self-developed rationale of safety and efficiency to uphold the preference guarantees no such administrative or judicial accountability. Indeed, the safety and efficiency of the prison system theoretically could support a wide variety of administrative actions. For example, permanent racial segregation of prison inmates might happen to serve the goals effectively.

But just as these goals presumably would not legitimate such action, they do not justify racial classification in the prison employment system.

In sum, it is only the remedying of discrimination which may arguably be relied upon to permit racial classifications to be established by public bodies. There are no constitutional grounds for approving such classifications on the basis of ruminations or *ipse dixit* of a court as to possible concerns for safety and efficiency of administration, particularly where, as here, such classifications impact adversely upon the promotion and transfer expectations of innocent, identifiable incumbent employees. *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991. Moreover, that the Correctional Department itself did not see fit to articulate these considerations as the motivating force for the classifications highlights the lack of support in the record for the judgment of the California Court of Appeal.

Because the California Court of Appeal failed to address the reasons, if any, the Correctional Department had for promulgating its preference scheme, its constitutional analysis is critically impaired. The inadequacy of its review is particularly striking in light of its expressed intent to apply "strict scrutiny" to the AAP. (Cert. Pet. App. A-14) See *Loving* v. *Virginia*, 388 U.S. 1 (1967). For so impaired is the AAP by the Department's failure to make a record that strict scrutiny, with its accompanying presumption of unconstitutionality need not be invoked. Measured only in terms of whether the AAP's preference serves "important government objectives," *Califano* v. *Webster*, 430 U.S. 313 (1977), the silence

of the plan with respect to past discrimination ends the search for such objectives practically before it begins.

II. Even If the Plan was Adopted to Remedy Discrimination, the State's Racial Preference Program Was Not Suited to the Accomplishment of that Purpose

A. *Introduction*

In *Teamsters* v. *United States*, 431 U.S. at 340 n.20 (1977), this Court articulated, within the context of Title VII, the role of statistical evidence in pattern or practice discrimination cases:

> Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a tell-tale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial or ethnic composition of the population in the community from which employees are hired.

A legally fatal characteristic of the Correctional Department's AAP is its strictly results-oriented approach. The AAP fashions percentage goals for entry-level positions absent the underlying statistical evidence which *may* have served to establish a *prima facie* case of discrimination. Without such evidence, the Court can review the validity of the AAP's preferential scheme only by working backwards, that is, by drawing the questionable conclusion that probative evidence of discrimination existed based on the untested assumption that the number of minorities and women hired or employed was disproportionate to their number available in the relevant job market.

See *Hazelwood School District* v. *United States*, 433 U.S. at 310-13; *Teamsters* v. *United States*, 431 U.S. at 342 n.23. As indicated below, however, an appropriate analysis of the relevant job market never was undertaken.

The usefulness of statistical methodology as an aid to identifying discrimination, and thus in fashioning appropriate remedies, depends upon the identification of an appropriate comparative data base, typically incorporated within the concept of the "relevant labor market." This defines the pool of qualified people from which an employer draws applicants.

Two major elements comprise the relevant labor market: *qualifications* and *geographic location*. Other factors, such as the relevant time frame, also play an important role in developing reliable statistical evidence comparing the qualified labor force with the employer's work force. Where special qualifications are required to fill particular jobs, courts in equal employment litigation typically require complainants seeking relief to come forward with "qualified labor market" statistics based on these factors. *See, e.g.*, *Roman* v. *ESB, Inc.*, 550 F.2d 1343 (4th Cir. 1976); *EEOC* v. *Radiator Specialty Company*, 610 F.2d 178 (4th Cir. 1979); *Pack* v. *Energy Research and Development Administration*, 566 F.2d 1111 (9th Cir. 1977). Of course, "once a prima facie case has been established by statistical work force disparities, the employer must be given an opportunity to show" that the plaintiff's statistics are improper, misleading, or distorted. *Hazelwood*, 433 U.S. at 309. In the posture in which this case is presented, however, neither the California courts nor this Court has before it the

sufficiently fine-tuned work force statistics necessary to evaluate whether the AAP's percentage goals are based upon anything other than arbitrary administrative determinations.

If work force statistics are not tailored to the qualified labor pool and to the appropriate geographic scope, an inference of discrimination is not reasonable or permissible, since any resulting disparity may be caused by numerous factors other than discrimination. Indeed, as this Court has observed, broad based statistics which include a substantial number of people who realistically cannot be considered potential applicants are "virtually irrelevant" for comparison purposes. *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 586 (1979). *See also Hazelwood School District* v. *United States*, 433 U.S. at 308 n.13.

As will be explained below, in setting percentage goals for minorities and women, the Correctional Department's AAP ignored in the case of "minorities" the need to compare the employer's work force to the qualified labor pool and, in the case of women, the need to define the proper geographic scope for evaluating its projected work force. In so doing, its goals became arbitrary and capricious mechanisms for enforcing preferential treatment which were unrelated to remedying discrimination and which impacted adversely on identifiable incumbent employees.

B. *The Correctional Department's Establishment of Minority Employment Goals Based Upon Inmate Population Served No Recognizably Remedial Purpose*

The Correctional Department's AAP included, as a stated goal, increasing the number of "minority" employees to a level equalling at least 70 per cent of any given "minority" in the inmate population of the Department. That the comparison of correctional employees to correctional prison inmates misconceives the role of statistics in employment discrimination cases is patent, and, under *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), cannot stand.

In *Hazelwood*, the district court absolved the school district of unlawful employment practices on the basis of the paucity of black students in the Hazelwood schools. 392 F. Supp. 1276, 1287-88. The court of appeals concluded that the district court had erred in comparing the percentage of black teachers in the district with the percentage of black students in its schools rather than with the percentage of black teachers in the relevant labor market area. "The level of black student enrollment in Hazelwood school," said the court, "sheds no light whatsoever upon the dispute before us, . . ." 534 F.2d 805, 812. This Court agreed with the court of appeals (433 U.S. at 308):

> that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the

> racial composition of the qualified public school teacher population in the relevant labor market (citation and footnote omitted).

Hazelwood unequivocally established that probative statistical evidence involves a comparison, *inter alia*, of the "qualified labor market," at least in cases such as here, where the jobs in question are not ones for which the general public is presumptively qualified. Indeed, where labor force data are not reasonably tailored to those qualified for the jobs in question, courts frequently consider the statistical error fatal to employment discrimination suits. See *Roman* v. *ESB*, 550 F.2d 1343 (4th Cir. 1976); *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946; and *Holder* v. *Old Ben Coal Co.*, 618 F.2d 1198 (7th Cir. 1980) (simply because a job is catagorized as "unskilled" does not necessarily mean that certain qualification or experience may not be required by the employer).[6] Such an approach is consistent not only with the policy of promoting sound statistical methodology, but also with the constitutionally-mandated need to protect the rights of innocent employees. As the Second Circuit stated in *Rios* v. *Enterprise Ass'n of Steamfitters, Local 638*, 501 F.2d 622, (1974):

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[6] The Correctional Department's use of the inmate population as the measure for projected minority employment is not unlike those instances in which it has been held impermissible for employers to adjust the racial or sexual profile of its work force in accordance with actual or perceived customer or client preference. See *Diaz* v. *Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971); 29 C.F.R. § 1604.2(iii) (refusal to hire individual because of the preferences of clients or customers unlawful).

> [W]e believe that from the outset the court should be guided by the most precise standards and statistics available in view of the delicate constitutional balance that must be struck in the use of such goals or quotas between the elimination of discriminatory effects, which is permissible, and the involvement of the court in unjustifiable reverse racial discrimination, which is not. (Citation omitted.)[7]

Unlike *Rios*, however, the record here contains no showing of discrimination against qualified non-white applicants.[8] Thus, the Correctional Department's ar-

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[7] In *Rios*, the district court had ordered a goal of thirty percent nonwhite membership in a union which had discriminated against qualified non-white applicants for membership. On appeal, however, the district court's order was remanded for a reassessment and recalculation of the percentage goal. The Second Circuit based its remand order on the fact that the union's membership was not drawn from the entire population, but rather consisted of male workers over 18 years of age. Persons under eighteen, whether minority or non-minority, were not admitted into the union or its apprenticeship program. Thus, even absent racial discrimination, "the non-white members of the Union would have been drawn from the male work force over 18 years of age in the Union's jurisdiction." 501 F.2d at 632.

[8] The Correctional Department's Affirmative Action Program Assessment shows, in fact, that even in terms of general population figures, as of 1973, black personnel in the Department were overrepresented by approximately 2.5% of their expected proportion. Ex. R. See *Guardians Ass'n of N.Y. City Police Dept.* v. *N.Y.C. Civil Service Commission*, DLR No. 170, D-1, D-21 (2d Cir. July 31, 1980):

> If the disparity between existing minority employment and relevant work force percentage were extreme and long-standing, that circumstance alone might justify some affirmative relief, especially if minority employ-

bitrary percentage goals simply compound the constitutional infirmity with which the AAP already suffers.

C. *The Correctional Department's Use of Statewide Female Employment Statistics to Establish a Percentage Goal Was Improper*

The *Hazelwood* Court also underscored the importance of considering the proper geographic scope of statistics in measuring accurately the existence *vel non* of adverse impact in hiring practices. Proper geographic scope can depend on a number of factors, including the skills involved, the level of compensation, the scope of recruting practices by competing employers, and the commuting patterns and availability of public transportation. 433 U.S. at 308; *see also Stastny* v. *Southern Bell Telephone & Telegraph Co.*, 23 FEP Cases 665, 674-75 (4th Cir. 1980); *Lim* v. *Citizens Savings and Loan Association*, 430 F. Supp. 802 (N.D. Cal. 1976); *Abron* v. *Black & Decker Mfg. Co.*, 439 F. Supp. 1095 (D. Md. 1977). Whatever factors are deemed most compelling in a particular situation, it is generally acknowledged that statistical comparisons based on an overly broad population pool are of limited usefulness. For a disparity is probative of discrimination only to the extent that it arises from a comparison of the employer's work force with the population of the *community from which the employer can reasonably be expected to hire.*

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ment were low. But where, as here, the disparity is not extreme and minority employment is not insubstantial, an affirmative hiring remedy must be based on detailed findings, supported by evidence, that there exists a pattern of prior discrimination warranting such relief.

In accordance with these principles, a relevant geographic area *may* be the city or county in which the employer is located, or the standard metropolitan statistical area. In all events, the distance which individuals can be expected to travel to a workplace, particularly to a non-urban workplace which is not served by convenient public transportation, can be a significant factor in determining the relevant labor market. Thus, for example, in *Timken* v. *Vaughan*, 413 F. Supp. 1183 (N.D. Ohio 1976), the district court refused to accept the conclusions of the administrative law judge and the arguments of the government that a highly industrialized urban center with a large minority population percentage should be included in the area from which the employer could reasonably expect people to commute for work. The government's administrative findings were subjected to close analysis and found to be arbitrary, capricious, an abuse of discretion and not supported by substantial evidence. *See also United States* v. *County of Fairfax*, 23 FEP Cases 485, 490 (4th Cir. 1980) (lack of transportation and differences in wage rates were valid reasons for excluding urban area from relevant labor market area of suburban employer).

In the Correctional Department's AAP, the number of female employees in the Department was set to reach a percentage level equivalent with that in the total "California labor force" in 1970. Yet, factors such as a comparatively low female population in remote areas where some California prisons are located may make it wholly unrealistic to expect that women throughout the entire state of California will apply in proportion to their representation in the population.

CONCLUSION

In approving the Correctional Department's AAP, the California Court of Appeal failed to adhere to the constitutional limitations on preferential schemes imposed by governmental bodies to the detriment of the legitimate expectations of other employees innocent of wrongdoing. Furthermore, even had the need for relief been shown, the California court was in error in permitting the Correctional Department to base its percentage goals in hiring on inappropriate and irrelevant statistical factors. For these reasons, and those stated above, EEAC submits that the judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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